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No. _____

In The

Supreme Court of the United States

October Term, 1996

JACK C. HARVARD,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED FOR REVIEW[1]

I.

Whether materiality is an essential element of the offense of making a false entry in the books, records or statements of a federally insured financial institution, as proscribed by Title 18, United States Code, Section 1005.

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[1] The names of all parties to this proceeding appear in the caption. See Rule 14.1(b) of the Supreme Court Rules.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION OF THE COURT BELOW 1

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED ... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT AND REASONS FOR GRANTING THE WRIT 6

CONCLUSION 9

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Johnson v. United States, ___U.S.___, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1977) 8

United States v. Adamson, 700 F.2d 953 (5th Cir.1983) (*en banc*) 7

United States v. Gaudin, ___U.S.___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) 4, 6, 7

United States v. Harvard, 103 F.3d 412 (5th Cir.1997) 1, 7, 8, 9

United States v. McGuire, 744 F.2d 1197 (6th Cir.1984), *cert. denied*, 471 U.S. 1004 (1985) 8

United States v. Mmahat, 106 F.3d 89 (5th Cir.1997) 9

United States v. Pettigrew, 77 F.3d 1500 (5th Cir.1996) 9

United States v. Rapp, 871 F.2d 957 (11th Cir.), *cert. denied*, 493 U.S. 890 (1989) 8

United States v. Shunk, ___F.3d ___, 1997 U.S. App. LEXIS 10481 (May 8, 1997) 9

United States v. Wells, ___U.S.___, 117 S.Ct. 921, 137 L.Ed. 2d 107 (1997) 6, 8

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jack C. Harvard respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on March 27, 1997, to resolve the conflicts among the Circuit Courts of Appeals on the important federal issue presented herein.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which gives rise to this petition is reported as *United States v. Harvard*, 103 F.3d 412 (5th Cir.1997). The opinion is attached to this petition as Appendix "A". By order entered on March 27, 1997, the Fifth Circuit denied Harvard's petition for rehearing, and his suggestion for rehearing *en banc*. This order is attached to this petition as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

On September 29, 1995, following a trial by jury, a judgment and conviction order was entered against Jack C. Harvard in the United States District Court for the Eastern District of Texas, Sherman Division, sentencing Harvard to seven (7) years imprisonment, and ordering him to pay restitution in the amount of $973,012.55. That same day, Harvard timely filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit. On January 7, 1997, the Fifth Circuit issued an opinion

affirming Harvard's conviction and sentence. Harvard timely filed a petition for rehearing, and a suggestion for rehearing *en banc*. On March 27, 1997, the Fifth Circuit denied the petition for rehearing, and the suggestion for rehearing *en banc*. In accordance with Supreme Court Rule 13.3, this petition has been filed within ninety (90) days of the date of the order denying the petition for rehearing, and the suggestion for rehearing *en banc*.

Accordingly, this Court has jurisdiction over this matter pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1005 provides, in pertinent part:

> Whoever makes any false entry in any book, report, or statement of [a] bank . . . with intent to injure or defraud such bank . . . [s]hall be fined . . . or imprisoned . . . or both.

STATEMENT OF THE CASE

On October 12, 1994, a federal grand jury sitting in the Eastern District of Texas, Sherman Division, returned a multi-count count indictment against Jack C. Harvard, the former Chairman of the Board of Willow Bend National Bank, and a former director of Bonham Bank (V.1, pp. 16-44). Count 4 of this indictment alleged that

Harvard violated 18 USC § 1005, because he "did knowingly and with the intent to deceive the OCC examiners make a false entry in a book, report and statement of Willow Bend [Bank] . . . " Count 1 of the indictment, a conspiracy count, alleged that one of the objects of the conspiracy was the commission of the substantive offense described in count 4.

Before trial, Harvard submitted proposed jury instructions for the case, among which were an instruction regarding "materiality," which defined materiality, and called for the question of materiality to be submitted to the jury, and an instruction regarding 18 USC § 1005, which did the same. The trial court denied these requested charges, and gave (in pertinent part) the following instruction regarding 18 USC § 1005:

> An entry may be false if it omits material information. An entry may also be false when it contains a half truth or when it conceals a material fact, and a statement that is technically true may be false if the transaction it reports is a sham or mere formality. An omission of material information as well as affirmative representations also constitutes a false statement.
>
> You are instructed that these entries are material within the meaning of the statute, and you are not to concern yourselves with the issue of materiality.

Thereafter, Harvard was convicted of, *inter alia*, count 4, (the substantive violation of § 1005), and count 1, (the conspiracy to violate three federal statutes, including 18 USC § 1005).

Exactly one month after the jury's verdict in his case, this Court handed down its decision in *United States v. Gaudin*, ___U.S.___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Because the district court had not yet ruled on Harvard's post-trial "Motion for a Judgment of Acquittal, and a New Trial," Harvard supplemented his original submission to bring *Gaudin* to the attention of the district court, and to request a new trial on count 4, among others. The Government responded to the supplement, contending that materiality was *not* an element of 18 USC § 1005. The district court denied Harvard's motion, stating:

> In his supplement to his motion, defendant contends that he is entitled to a new trial because of the decision of the Supreme Court in *United States v. Gaudin*, No. 94-514, 1995 WL 360212 (Sup. Ct. June 19, 1995). The court has concluded that *Gaudin* is not controlling in this case. In *United States v. Gaudin*, the defendant was prosecuted for violating Title 18, United States Code, Section 1001. Materiality is an essential element that the government must prove in order to establish a violation of 18 U.S.C. § 1001. In this case Defendant Harvard was charged with violating 18 U.S.C. 656 and 18 U.S.C. 1005. Materiality is not an essential element in order to establish a violation of either of these sections. This court's instructions to the jury concerning the required elements to prove a violation of these statutes were correct. Any reference by the court to material information and materiality in the court's instructions on 18 U.S.C. 1005 did not lower the government's standard of proof or prejudice the defendant in any other way. (The opinion and order of the

district court is attached to this petition as Appendix C.)

In his appeal to the Fifth Circuit, Harvard contended that materiality was an element of 18 USC § 1005, and that the district court's failure to permit the jury to decide the issue of materiality entitled him to a new trial on counts 1, 2, 3 and 4 of the indictment. [Although only count 4 alleged a substantive violation of 18 USC § 1005, Harvard contended that granting him a new trial on that count would necessitate granting him a new trial on count 1, because count 1 incorporated the allegations of count 4. A new trial on count 1 would in turn necessitate granting him a new trial on counts 2 and 3, because of the jury instructions given in the case. The Fifth Circuit did not consider Harvard's contentions with regard to counts 1, 2, and 3, because of its resolution of the materiality question raised in conjunction with count 4. See Appendix A-16, f.n. 9].

While the Fifth Circuit acknowledged that "two other circuits appear to have decided, without debate, that conviction for an actual misstatement under § 1005 requires proof of materiality . . . " (Appendix A-15-16), and that the government is required to prove materiality "when it seeks to convict a defendant pursuant to § 1005 for an *omission* of information . . . " (Appendix A-13, emphasis in original), the Fifth Circuit rejected Harvard's contention, holding:

> Based upon due respect for the statutory text, pertinent case law, and related legislation, we conclude that materiality is not an element of a § 1005 offense charging an actual misstatement. (Appendix A-12)

Harvard timely petitioned for a rehearing, and timely filed a suggestion for rehearing *en banc*, both of which were denied. Consequently, relief is sought in this Honorable Court.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER, AND IS IN CONFLICT WITH ITS OWN OPINIONS REGARDING PROSECUTIONS UNDER 18 USC § 1005 FOR "OMISSIONS," AS OPPOSED TO PROSECUTIONS FOR "MISSTATEMENTS."

As is demonstrated by the facts giving rise to this Court's decisions in *United States v. Gaudin*, 515 U.S.___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), *United States v. Wells*, ___U.S.___, 117 S.Ct. 921, 137 L.Ed. 2d 107 (1997), and *Johnson v. United States*, ___U.S.___, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1977), before *Gaudin*, the materiality of any given false statement forming the basis of a criminal prosecution was invariably treated as a question of law, one to be decided by the court. And just as it was assumed, almost without question, that such a practice was constitutionally acceptable, it was also assumed, again almost without question, that materiality was an essential element of almost all "false statement" statutes. [See the dissenting opinion of Justice Stevens in *United States v. Wells, supra*].

Harvard's prosecution is a paradigm of the practices and assumptions in the district courts before *Gaudin*. It is evident from the jury instructions requested by the government, and the instructions actually given by the district court, that all parties, including the district court, assumed that 18 USC § 1005 incorporated a materiality requirement. And two of those parties, the government and the court, assumed that it was the court, not the jury, that should address that issue.

Gaudin changed both the practices in the district courts, and the assumptions made by the parties. Because of the principal holding of *Gaudin*, materiality became a question for the jury. Because of Chief Justice Rehnquist's concurring opinion in *Gaudin*, in which he was joined by Justices O'Connor and Breyer, in the absence of express statutory language making materiality an element of the offense, inferior courts no longer assumed that a materiality requirement was incorporated into any given false statements statute. As might be expected, the revisiting of decades old assumptions has produced mixed, and potentially contradictory results with regard to a number of statutes, including 18 USC § 1005.

Notwithstanding its prior case law which implied that materiality was an element of *all* prosecutions under 18 USC § 1005, *see United States v. Adamson*, 700 F.2d 953, 968 (5th Cir.1983) (*en banc*), in *Harvard* the Fifth Circuit explicitly held that materiality is not an element of prosecutions under 18 USC § 1005 **if the prosecution is for an actual misstatement**, as opposed to an **omission**. (Appendix A-16). However, as the Fifth Circuit itself noted, this holding is in apparent conflict with at least two other circuit courts of appeals:

> As Harvard points out, two other circuits appear to have decided, without debate, that conviction for an actual misstatement under § 1005 requires proof of materiality. *See United States v. Rapp*, 871 F.2d 957, 963 (11th Cir.), *cert. denied*, 493 U.S. 890 (1989); *United States v. McGuire*, 744 F.2d 1197, 1202 (6th Cir.1984), *cert. denied*, 471 U.S. 1004 (1985). Other courts appear to require proof of materiality for false omissions, and it is uncertain whether their materiality requirement has been extended further. *See, e.g., United States v. Austin*, 823 F.2d 257, 259 (8th Cir.1987), *cert. denied*, 484 U.S. 1044 (1988); *United States v. Krepps*, 605 F.2d 101, 109 (3rd Cir.1979). (Appendix A-15, 16).

Although *Rapp's* holding that materiality is an element of 18 USC § 1014 was recently overruled by this Court's decision in *Wells*, its treatment of 18 USC § 1005 remains unmodified, as does *McGuire's*.

The decision of the Fifth Circuit in *Harvard* not only creates an intra-circuit conflict with regard to the statutory elements of 18 USC § 1005, it creates a dichotomy with regard to the two types of offenses proscribed by 18 USC § 1005. As the *Harvard* court noted, prosecutions under the statute for **omissions** still require proof of materiality. (Appendix, A-16). Consequently, the statute now contains two separate and distinct offenses, **with different elements**. The legislative history of the statute gives no indication that this is even close to what Congress intended.

Finally, a grant of *certiorari* is appropriate, as the decision of the Fifth Circuit creates illogical inconsistencies between and among the offenses contained in Chapter 47

("Fraud and False Statements") of Title 18 of the United States Code. As noted above, after *Harvard*, materiality is no longer an element of the **misstatements** prong of § 1005. Yet materiality continues to be an element of **any** prosecution under 18 USC § 1006. *See United States v. Pettigrew*, 77 F.3d 1500 (5th Cir.1996), *United States v. Mmahat*, 106 F.3d 89 (5th Cir.1997), and *United States v. Shunk*, ___F.3d ___, 1997 U.S. App. LEXIS 10481 (May 8, 1997). Given that the names of the agencies protected constitutes the primary difference between § 1005 and § 1006, a distinction such as the one created by the *Harvard* decision gives federal criminal law a haphazard nature that should be completely unacceptable to this Court.

CONCLUSION

Wherefore, for the foregoing reasons, this Court is respectfully urged to grant Harvard's petition, and to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in the instant proceeding.

New Orleans, Louisiana, this 25th day of June, 1997.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jack C. HARVARD,
Defendant-Appellant.

No. 95-40818.

United States Court of Appeals,
Fifth Circuit.

Jan. 7, 1997.

Defendant bank officer was convicted in the United States District Court for the Eastern District of Texas, Paul N. Brown, J., of conspiracy, bank fraud, misapplying bank funds, causing false bank entries to be made, and receiving bribe for bank transaction. Defendant appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) statute that criminalizes act of causing false bank entries to be made does not embody requirement of materiality for actual misstatement; (2) defendant was not forced to defend himself at trial while unaware of charges against him; (3) evidence supported convictions; and (4) civil banking regulations were admissible for limited purpose of showing defendant's motive or intent.

Affirmed.

Michael E. Savage, Asst. U.S. Attorney, United States Attorney's Office, Plano, TX, Jeffrey John Strand, Asst. U.S. Attorney, Office of the United States Attorney, Tyler, TX, for plaintiff-appellee.

Herbert V. Larson, Jr., New Orleans, LA, for defendant-appellant.

Appeal from the United States District Court for the Eastern District of Texas.

Before WISDOM, JONES and WIENER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Jack C. Harvard appeals his convictions for conspiracy, bank fraud, misapplying bank funds, causing false bank entries to be made, and receiving a bribe for a bank transaction. The most difficult question he raises on appeal is whether 18 U.S.C. § 1005, which criminalizes the act of causing false bank entries to be made, embodies a requirement of materiality for an actual misstatement. We hold that it does not and affirm Harvard's conviction on this and the other counts against him.

I. FACTUAL BACKGROUND

A detailed recitation of the facts as presented at Harvard's trial is necessary for resolution of the issues presented.

A. Harvard's Many Hats

In 1983, Harvard, then vice-president at Northpark Bank of Dallas ("Northpark"), led a group of investors in borrowing $1,493,000 from Northpark to organize Willow Bend National Bank ("Willow Bend"), a federally insured bank. Harvard served as chairman of the board and chief executive officer at Willow Bend until August 1989. Willow Bend Bancshares, Inc. ("Bancshares"), a bank holding company in which Harvard became chairman of the

board, was formed in 1984 to acquire Willow Bend. Bancshares also acquired Bonham State Bank ("Bonham"). Harvard was a director at Bonham from 1984 to 1989. Incidentally, Harvard served as mayor of Plano, Texas during the mid-1980s.

B. The Cheng/Schapiro Loans

In 1987, Diana Cheng, a Dallas businesswoman, needed $400,000 and a $1,000,000 letter of credit in order to undertake a $2,000,000 Indonesian lumber import deal. A customer and shareholder of Willow Bend, Cheng had been involved in commercial real estate in the Dallas area for several years. Cheng discussed her needs for the Indonesian transaction with Thomas C. Flood, a loan officer at Willow Bend. Flood informed Cheng that Willow Bend could not grant her the loan because she had reached her borrowing limit. Nevertheless, Flood arranged a meeting among Harvard, Cheng, and himself at which Harvard informed Cheng that Willow Bend could lend the money if something was in it for him. By the end of the meeting, Cheng had agreed to give Harvard and Flood, respectively, a 10% and 5% share of the import business. At the meeting, Flood intimated that Cheng should create a real estate note to pledge as collateral for the loan. Cheng did so by creating a $395,600 note payable by her joint venture to the fictitious name of C.D. Donge (the "Donge note"). In connection with these events, Cheng pleaded guilty to conspiring to give money to Harvard and Flood and creating a false document to obtain a loan from Willow Bend. She testified against Harvard.

Harvard then asked Jay Paul Schapiro, an acquaintance through bank-related business and various civic activities, to purchase the Donge note from Willow Bend "to get it off the books."[1] Harvard told Schapiro that the note was secured by undeveloped real estate. When Schapiro stated that he could not pay off the note in the event of default, Harvard assured him that he would find a guarantor, who turned out to be Ms. Cheng. Schapiro purchased the note. Although such notes would usually be purchased at a discount, in this transaction Schapiro borrowed the face value of the note – $395,000 – from Willow Bend in return for a $9,000 fee. Apparently unbeknownst to Schapiro, the actual discounted price of the note was $345,000; the remaining balance, less Schapiro's fee, went to Willow Bend. Schapiro never made any payments on the note and was told by Harvard and Flood to ignore late notices and demands for collection. In May of 1987, Flood had the deed of trust for the Donge note recorded in the county real estate records, even though the Donge note was dated December 9, 1985. Cheng gave cash payments of $15,000 to Flood and $10,000 to Harvard. Flood pleaded guilty to bank bribery.

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[1] Purchasing a note usually consists of discounting a promissory note to present value or below and then borrowing funds to purchase it. This produces a positive cash flow if the payments on the loan by the purchaser of the note are below the payments on the original note.

C. The Joint Venture Loan

In 1985 Harvard had a 10% interest in the Plano-Shiloh Joint Venture (the "Joint Venture"), which purchased and operated a strip mall in Plano, Texas. By March of 1986, the Joint Venture was not self-sustaining and each partner was requested to contribute additional capital. The Joint Venture experienced a loss in excess of $81,986 in 1986, and by 1987 was still losing money. When the Joint Venture decided to refinance with a different lender to reduce interest expenses, Harvard volunteered to assist in having the note refinanced at Bonham where, as stated earlier, he was a director. Harvard solicited John Armstrong, then a bank officer who had risen to chairman of the board by the time of trial, and assured Armstrong that the loan was performing and that the shopping center was "cash flowing." Armstrong also asked for and received assurance that an appraisal substantiating the value of the Joint Venture property would be provided.

The Board of Bonham approved the loan. Although Harvard did not vote on the loan, the directors were well aware that Harvard was the chairman of Bancshares, Bonham's holding company. Additionally, on at least one occasion, Harvard reminded Warren Jamieson – president and chief executive officer of Bonham – of Harvard's control of Bonham and his ability to replace Jamieson. In extending the loan to the Joint Venture, Bonham required personal guarantees of the individual joint venture participants. On May 29, 1987, the title company forwarded all documents for the loan, including the guarantees, to

Nancy Long, Harvard's then-secretary at Willow Bend.[2] Oddly, the guarantee agreements showed the Joint Venture to be indebted to Willow Bend, not Bonham. Harvard was aware of these defects of the guarantees.

After closing on the loan with Bonham, Brenda Brown, a one-percent participant in the Joint Venture and an employee of the Joint Venture's management company, was instructed by her boss at the managing company to write a check in the amount of $10,640 (one percent of the loan amount) payable to Harvard and to call it a "consulting fee." This payment to Harvard was not disclosed on the settlement sheet to Bonham nor was it disclosed by any of the other partners of the Joint Venture.

D. The Unauthorized Cashier's Check

In 1989 Willow Bend's procedure for the issuance of cashier's checks required bank tellers, at the time that cashier's checks were issued, to collect payment of either cash or a cash equivalent. After doing so, a special machine would imprint the appropriate amount on the check along with a machine imprinted signature. Amounts in excess of $5000 required a bank officer's signature; very large amounts required the signature of Willow Bend's vice-president. The details regarding the issuance of all cashier's checks – including the date, check number, remitter, payee, and amount – were to be entered into a cashier's check log at the time of issuance.

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[2] Nancy Long is now Harvard's wife.

On March 7, 1989, Harvard called Warren Jamieson, who was still president, chief executive officer, and – at this time – a director of Bonham, to borrow money from Bonham for the purchase of a house at a foreclosure sale. Harvard represented to Jamieson that he needed only interim financing for the house as he had already obtained a commitment for personal financing from Plano Savings and Loan conditioned on his becoming the successful bidder. Jamieson told Harvard that he did not have the authority to approve another $175,000 debt to Harvard, but he would seek the Board's approval, which was obtained that day. Jamieson informed Harvard, however, that the loan would not be funded until Bonham received the loan documents. The loan documents prepared at Willow Bend were faxed to Bonham the following day, March 8. On that day, Bonham wire transferred $175,000 to Harvard's personal account at Willow Bend.

On March 7, the day before the money was wired (and the same day that Harvard requested the loan from Jamieson), Janice Smith, a teller at Willow Bend, handed Harvard two blank cashier's checks. Ignoring Willow Bend's policy, she did not record in the cashier's check log the details of her parting with these checks. She knew that Harvard was the chief executive officer at Willow Bend, and she did not question him about the checks. She was also unaware that Harvard left the bank with both cashier's checks. Laura Palmer, Smith's supervisor, completed the log after Smith left for the day. Palmer entered "Farm and Home, $166,201" for one of the cashier's checks and initialed the entry; the other cashier's check was voided. Harvard ultimately completed the check by endorsing it and writing in by hand the amount of

$166,201 payable to "Farm and Home Savings." This cashier's check was dated March 7, 1989, but the date stamp on the back of the check was March 8. The proof stamp on the face of the check was March 9. Neither Palmer nor Smith ever received any cash payment for either cashier's check. The cashier's check for $166,201 was used to purchase a house at a foreclosure sale on March 7. Willow Bend did not receive funds to pay for the check until June 11, 1989. As a result, Willow Bend suffered a cash loss of $117.73 in interest income it would have received from the $166,201.

E. Indictment and Convictions

After a trial to a jury, Harvard was convicted pursuant to the indictment of:

> Count One – violating 18 U.S.C. § 371 by conspiring to (a) misapply monies belonging to Willow Bend, (b) make and cause to be made false entries in the books of Willow Bend, and (c) corruptly accept something of value in connection with the business of Willow Bend;
>
> Count Two – violating 18 U.S.C. § 215 by corruptly accepting something of value in connection with the business of Willow Bend;
>
> Count Three – violating 18 U.S.C. § 656 by misapplying monies belonging to Willow Bend;
>
> Count Four – violating 18 U.S.C. § 1005 by making a false entry on the books of Willow Bend in connection with the Cheng/Schapiro loans;

> Count Five – violating 18 U.S.C. §§ 1344 and 2 by committing and aiding and abetting in the commission of bank fraud; and
>
> Count Fourteen – violating 18 U.S.C. §§ 1005 and 2 by misapplying monies and aiding and abetting in the misapplication of monies belonging to Willow Bend.

Harvard complains on appeal that (1) the district court erred in instructing the jury that 18 U.S.C. § 1005 does not require a finding by the jury of materiality regarding the false entries; (2) there was insufficient evidence to convict on two of the offenses; and (3) the government's references at trial to Harvard's violations of civil banking regulations deprived him of a fair trial under counts 5 and 14 of the indictment.

II. DISCUSSION

A. 18 U.S.C. § 1005

18 U.S.C. § 1005 provides, in relevant part:

> Whoever makes any false entry in any book, report, or statement of [a] bank . . . with intent to injure or defraud such bank . . . or to deceive any officer of such bank . . . [s]hall be fined . . . or imprisoned . . . or both.

18 U.S.C. § 1005 (West Supp.1996).

In regard to this § 1005 offense charged against Harvard, the court instructed the jury, in relevant part:

> An entry may be false if it omits material information. An entry may also be false when it contains a half truth or when it conceals a material fact, and a statement that is technically true

> may be false if the transaction it reports is a sham or mere formality. An omission of material information as well as affirmative representations also constitutes a false statement.
>
> You are instructed that these entries are material within the meaning of the statute, and you are not to concern yourselves with the issue of materiality.

R19:1993. Harvard asserts that because of the Supreme Court's recent decision in *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), this instruction was in error because it did not require the jury to make a finding of materiality. We review a court's refusal to include a requested instruction in the charge for an abuse of discretion. *See United States v. Pettigrew*, 77 F.3d 1500, 1510 (5th Cir.1996) (citing *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1798, 131 L.Ed.2d 725 (1995)). "Generally, refusal to include a requested instruction is reversible error only if the requested instruction is substantially correct, the actual charge given the jury did not substantially cover the content of the proposed instruction, and the omission of the proposed instruction would seriously impair the defendant's ability to present a defense." *Id.*

In *Gaudin*, the Court held that, where materiality of a false statement *is an element of the offense charged*, the defendant has the right to have the jury decide the issue of materiality. *See Gaudin*, ___ U.S. ___, 115 S.Ct. at 2314. On that basis, the Court affirmed reversal of Gaudin's

conviction under 18 U.S.C. § 1001.[3] *See id.* In *United States v. Pettigrew, supra,* we relied on *Gaudin* in ruling that a jury must make a finding of materiality in order to establish a violation of 18 U.S.C. § 1006.[4] *See Pettigrew,* 77 F.3d at 1511.

Significantly, neither in *Gaudin* nor in *Pettigrew* did the government contest materiality as an essential element of the offenses proscribed by §§ 1001 or 1006.[5] In

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[3] 18 U.S.C. § 1001 provides, in relevant part:

> Whoever . . . knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined . . . or imprisoned . . . or both.

Gaudin, ___ U.S. at ___, 115 S.Ct. at 2313.

[4] 18 U.S.C. § 1006 provides, in relevant part:

> Whoever . . . with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution . . . makes any false entry in any book, report or statement of or to any such institution . . . shall be fined . . . or imprisoned . . . or both.

18 U.S.C. § 1006 (West Supp.1996)

[5] "It is *uncontested* that conviction under [18 U.S.C. § 1001] requires that the statements be 'material' to the Government inquiry, and that 'materiality' is an element of the offense that the Government must prove." *Gaudin,* ___ U.S. at ___, 115 S.Ct. at 2313 (emphasis added). Some members of the Court commented further that "the Government's concessions [that materiality is an element of § 1001] have made this case a much easier one than it might otherwise have been. . . . [¶]Whether

this case it is different; the parties vigorously dispute whether materiality is a required element of an offense proscribed by § 1005.[6] Perhaps somewhat at odds with its jury instruction, the district court found that "[m]ateriality is not an essential element in order to establish a violation of [§ 1005]." Therefore, unlike the procedural posture of *Gaudin* and *Pettigrew*, this case poses the issue whether materiality is an essential element of the offense before we can consider the applicability of *Gaudin*. Based on due respect for the statutory text, pertinent case law, and related legislation, we conclude that materiality is not an element of a § 1005 offense charging an actual misstatement.

First, as quoted earlier, § 1005 makes no reference to the required materiality of a criminal false bank entry.

Second, we have found no Fifth Circuit case that imported a materiality requirement into § 1005. Instead, this court has previously stated:

'materiality' is indeed an element of every offense under 18 U.S.C. § 1001 is not at all obvious from its text." *Id.* at ___, 115 S.Ct. at 2320 (Rehnquist, J., concurring, joined by Justices O'Connor and Breyer).

Likewise, in *Pettigrew*, the government conceded that materiality was an essential element of an offense proscribed by § 1006. *See Pettigrew*, 77 F.3d at 1510.

[6] The government has become more assertive in contesting implied materiality requirements in federal criminal statutes. It recently applied for and received a grant of certiorari allowing the Supreme Court to consider whether a judicially engrafted materiality element exists in crimes defined by 18 U.S.C. § 1014. *See United States v. Wells*, 63 F.3d 745, 750-51 (8th Cir.1995), *cert. granted*, ___ U.S. ___, 116 S.Ct. 1540, 134 L.Ed.2d 645 (1996).

> The government establishes a violation of section 1005 by proving beyond a reasonable doubt that: (1) the entry is false; (2) the defendant either personally made the entry or caused it to be made; (3) the defendant knew the entry was false when he made it; and (4) the defendant intended that the entry injure or deceive the bank officers or public officers. . . . *An omission of material information as well as an actual misstatement qualifies as a false entry under the statute.*

United States v. Jackson, 621 F.2d 216, 219 (5th Cir.1980) (emphasis added). *See also United States v. Wolf*, 820 F.2d 1499, 1504 (9th Cir.1987) (setting forth the elements of a violation of § 1005 as not requiring a finding of materiality), *cert. denied*, 485 U.S. 960, 108 S.Ct. 1222, 99 L.Ed.2d 423 (1988). *Jackson* holds that the government establishes a violation of § 1005 if it proves, *inter alia*, that the defendant made either (1) an actual misstatement or (2) a *material omission* of information. *See id.* Proof of an actual misstatement does not require proof of its materiality. The government is only required to prove materiality after *Jackson* when it seeks to convict a defendant pursuant to § 1005 for an *omission* of information. As Harvard was indicted and convicted under § 1005 for an actual misstatement of information, no finding of materiality was required.[7]

Third, § 1005 does not require that the courts add an element of materiality because materiality is inherent in

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[7] This opinion does not consider whether *Jackson* might incorrectly require materiality in a case involving a fraudulent omission. The issue is not before us, and we are bound by the prior panel decision.

the statute. To convict an offender pursuant to § 1005, the jury must find that the false entry at issue was made *with intent to defraud or injure*. *See* 18 U.S.C. § 1005; *Jackson*, 621 F.2d at 219. It is highly unlikely that the government could show – or a jury would find – that a genuinely trivial entry was made with fraudulent or injurious intent. To rule otherwise and require the government to prove materiality would reward only that individual who intended to defraud or injure a bank, but did so by making a "non-material" misstatement. Based on the text of the statute, a more reasonable interpretation of § 1005 is that Congress intended that punishment follow culpability regardless of the "materiality" of the means chosen to effectuate the fraud or injury.

We must respect the fact that the legislature is entrusted with the responsibility of defining the elements of a criminal offense – particularly in the case of federal crimes, which are solely creatures of statute. *See Staples v. United States*, 511 U.S. 600, 603-606, 114 S.Ct. 1793, 1796-97, 128 L.Ed.2d 608 (1994). According to the plain language of § 1005, Congress manifested the intent to punish *any* false entry made with intent to defraud. Had Congress intended to reserve punishment for only those individuals who made *material* fraudulent entries, it could easily have done so. Indeed, Congress has expressly included a materiality requirement in other false statement statutes. *See, e.g.*, 18 U.S.C. § 1621 (perjury); 18 U.S.C. § 1623 (false declaration before grand jury or court); 18 U.S.C. § 922(a)(6) (false statement on firearms application); 18 U.S.C. § 1033 (false statement on insurance application). The absence of a materiality requirement in § 1005 thus seems deliberate.

In a related vein, this court recently decided *United States v. Upton*, 91 F.3d 677 (5th Cir.1996), *petition for cert. filed*, 65 U.S.L.W. 3310 (U.S. Oct. 8, 1996) (No. 96-560), in which we addressed whether materiality is an element of 18 U.S.C. § 287.[8] By its text, § 287, like § 1005, does not expressly require the false entry be material. This court reasoned:

> In making our own determination of whether materiality is an element of § 287, we look to the plain language of the statute. . . . The plain language of this provision in no way suggests that materiality is an element of the offense. "When we find the terms of the statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." The plain language of a statute must be followed unless the language is "so bizarre that Congress could not have intended it." We therefore . . . hold that materiality is not an element of 18 U.S.C. § 287.

Upton, 91 F.3d at 685 (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190-91, 111 S.Ct. 599, 604, 112 L.Ed.2d 608 (1991)) (citations omitted).

As Harvard points out, two other circuits appear to have decided, without debate, that conviction for an

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[8] 18 U.S.C. § 287 provides, in relevant part:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States . . . any claim upon or against the United States . . . knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned . . . and shall be subject to a fine. . . .

18 U.S.C. § 287 (West Supp.1996).

actual misstatement under § 1005 requires proof of materiality. *See United States v. Rapp*, 871 F.2d 957, 963 (11th Cir.), *cert. denied*, 493 U.S. 890, 110 S.Ct. 233, 107 L.Ed.2d 184 (1989); *United States v. McGuire*, 744 F.2d 1197, 1202 (6th Cir.1984), *cert. denied*, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985). Other courts appear to require proof of materiality for false omissions, and it is uncertain whether their materiality requirement has been extended further. *See, e.g., United States v. Austin*, 823 F.2d 257, 259 (8th Cir.1987), *cert. denied*, 484 U.S. 1044, 108 S.Ct. 778, 98 L.Ed.2d 864 (1988); *United States v. Krepps*, 605 F.2d 101, 109 (3rd Cir.1979). Bolstered by *Jackson, supra*, however, and by the foregoing analysis, we are confident that materiality is not an element of § 1005 when the government seeks, as here, to convict a defendant for an actual misstatement.[9]

B. Count 5

Harvard next complains that his convictions under Count 5 of the indictment should be reversed. Harvard claims that (1) he was forced to defend himself at trial while unaware of the charges against him and (2) there is insufficient evidence to uphold this conviction.

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[9] Because we hold that the district court did not err in removing the issue of materiality from the jury's consideration, it is not necessary to consider Harvard's complaints regarding his conviction for conspiracy stemming from his § 1005 violation or the substantive offenses pleaded under the conspiracy mantle.

Count 5 of the indictment charges Harvard with violations of 18 U.S.C. § 1344(1) and (2)[10] in connection with the Joint Venture:

> *The Scheme and Artifice*
>
> . . . It was part of the scheme and artifice to defraud and to obtain money, funds and credits from Bonham Bank, that HARVARD . . . would arrange for financing to [the Joint Venture] at Bonham Bank by misrepresenting the financial status of [the Joint Venture] and his personal interest in a one percent "consulting fee" for the finding of the loan.
>
> *Execution of the Scheme and Artifice to Defraud and Obtain Money:*
>
> . . . HARVARD . . . executed the scheme and artifice set forth above, in that (1) he misrepresented financial information concerning [the Joint Venture] to Bonham Bank, (2) received a payment of $10,640.00 from [the Joint Venture] and (3) arranged for financing to [the Joint Venture] at Bonham Bank by misrepresenting the financial status of [the Joint Venture] and his

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[10] 18 U.S.C. § 1344 provides, in relevant part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property . . . of a financial institution, by means of false or fraudulent pretenses, representations, or promises . . . shall be fined . . . or imprisoned . . . or both.

18 U.S.C. § 1344 (West Supp.1996).

personal interest in a one percent "consulting fee" for the finding of the loan.

R1:28-29.

1. Multiple Charges

Section 1344 prohibits two types of conduct: (1) a scheme to defraud and (2) a scheme to obtain monies by false representation. *See* 18 U.S.C. § 1344 (West Supp.1996). Count 5 of Harvard's indictment alleges violations of *both* types of proscribed conduct. It is this about which Harvard complains He claims that because a single count of the indictment identified two crimes, he was forced to defend himself at trial while uninformed of the precise charges against him. Harvard's argument is without merit.

"Where a statute specifies several alternative ways in which an offense can be committed, the indictment may allege the several ways in the conjunctive, and a conviction thereon will stand if proof of one or more of the means of commission is sufficient." *Fields v. United States*, 408 F.2d 885, 887 (5th Cir.1969) (footnote omitted); *see also United States v. Wiley*, 979 F.2d 365, 368 (5th Cir.1992). In Harvard's case, the government elected before the jury was charged – as is its option – to proceed under § 1344(1). The district court did not err in permitting the government to do so. The record shows that Harvard was fully prepared to and did defend against the charge that he engaged in a scheme to injure or defraud the bank on the Joint Venture loan.

2. Sufficiency of the Evidence

Harvard also argues that the evidence was insufficient to support his conviction under § 1344(1). In reviewing a conviction for sufficient evidence, this court determines whether any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *See United States v. Blackburn*, 9 F.3d 353, 356 (5th Cir.1993) (citing *United States v. Hernandez-Palacios*, 838 F.2d 1346, 1348 (5th Cir.1988)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 102, 130 L.Ed.2d 51 (1994). We view the evidence in the light most favorable to the government and give the government the benefit of all reasonable inferences and credibility choices. *See id.* To establish a violation of § 1344(1), the government was required to prove (1) that Harvard executed or attempted to execute a scheme or artifice to defraud Bonham; (2) that Bonham was a federally insured institution; and (3) that he acted knowingly. *See id.* The phrase "scheme or artifice to defraud" may be established by proving a scheme or artifice to defraud another of the intangible right of honest services. *See United States v. Hooten*, 933 F.2d 293, 296 (5th Cir.1991).

The government presented expert testimony supporting its position that, under applicable law, bank directors are required to disclose their personal interests in the bank's business. The evidence established that Harvard, while a director of Bonham, arranged to receive a 1% "consulting fee" – $10,640 paid out of the loan proceeds – for placing the Joint Venture loan. Harvard did not disclose his receipt of the money. Evidence was also presented establishing that although he did not personally vote on the loan, Harvard exerted influence over the

Board members' votes in other ways by, for example, reminding Warren Jamieson of Harvard's ability to replace him.

Both Armstrong and Jamieson testified that Bonham would not have made the Joint Venture loan if the Board had been aware of the Joint Venture's true financial condition. Armstrong and Jamieson also testified that Bonham relied on Harvard's untrue representations that the shopping center was "cash flowing" and 100% leased. The testimony at trial indicated that based on these representations, Bonham funded the loan prior to receiving the appraisal and that the appraisal did not support Harvard's representations.

Armstrong and Jamieson denied that Bonham would have funded the Joint Venture loan if the Board had been aware that the personal guarantee agreements signed by participants of the Joint Venture showed the Joint Venture was indebted to Willow Bend instead of Bonham as they should have been. The defective guarantees were prepared at Willow Bend, Harvard's bank, and the loan documents were processed by Harvard's secretary. Testimony elicited at trial indicated that Harvard knew of the defects in the guarantee agreements at the time of closing. The testimony also established that when Jamieson discovered the guarantees' defects in 1989, Harvard agreed that the Joint Venturers would execute new guarantees to Bonham if the Joint Venture could skip a payment on its loan. The jury could have concluded that Harvard knew the guarantees were defective but withheld this information from Bonham. As a result, it could have accepted the government's position that these

events constituted a scheme or artifice to defraud Bonham of its interest in the guarantees as security.

In sum, the evidence presented at trial concerning Harvard's acquisition of the "consulting fee" for his assistance in obtaining the loan for the Joint Venture and his taking advantage of faulty guarantees in association with that loan were sufficient to support a conviction pursuant to § 1344(1). A reasonable trier of fact could find beyond a reasonable doubt that Harvard knowingly executed a scheme or artifice to defraud Bonham Bank.

C. Count 14

Count 14 of the indictment alleges in relevant part:

> On or about March 7, 1989 . . . HARVARD, without authority from the directors of Willow Bend, with intent to defraud or injure Willow Bend knowingly made, drew, issued, put forth, or assigned a draft, or other obligation of Willow Bend . . . in the amount of $166,201.00 . . . for the purchase at foreclosure auction of a house and real estate with Willow Bend's funds, when he then knew that he did not have sufficient funds to pay for said cashier's check and that Willow Bend had not approved a loan to him in the amount of said check.

R1:43.

These acts constitute a violation of the second paragraph of 18 U.S.C. § 1005, whose elements are that (1) the bank is federally insured; (2) that Harvard made, drew, or issued a draft or obligation of the bank without authority

of its directors; and (3) Harvard intended to injure or defraud the bank.

Harvard again argues that there is insufficient evidence to support the jury's finding that he had intended to defraud or injure Willow Bend. His argument is that because he had arranged permanent financing for the house through Plano Savings and Loan and interim financing through Bonham prior to taking the cashier's checks from Willow Bend, Willow Bend was certain to get the $166,201 to cover the cashier's check and no intent to defraud or injure can be inferred from this evidence. We disagree.

Intent to injure or defraud may be proved " 'by showing a knowing, voluntary act by the defendant, the natural tendency of which may have been to injure the bank even though such may not have been his motive.' " *United States v. Hopkins,* 916 F.2d 207, 215 (5th Cir.1990) (quoting *United States v. Southers,* 583 F.2d 1302, 1305 (5th Cir.1978)). Harvard's unauthorized use of the cashier's checks resulted in a formal inquiry by the Office of the Comptroller of Currency. On March 7, 1989 Harvard, possessing the blank cashier's checks from Willow Bend, could have easily executed these checks for any amount and for any purpose. If he had chosen to do so, Willow Bend would have been obliged to pay because once issued, cashier's checks are certified funds and Willow Bend must pay on the instruments.

Harvard's disregard of Willow Bend's procedures placed the bank at risk and naturally tended to injure the bank. As a result of these events, and other evidence in the record, Willow Bend incurred an actual loss of $117.28

due to this transaction. This evidence was sufficient for a reasonable fact finder to conclude that Harvard violated the second paragraph of § 1005.

D. Civil Banking Regulations

Harvard finally argues that the district court abused its discretion in permitting evidence of and various references to civil banking regulations throughout his trial. We disagree.

We review the district court's evidentiary rulings for an abuse of discretion. *See United States v. Parks,* 68 F.3d 860, 867 (5th Cir.1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 825, 133 L.Ed.2d 768 (1996). Evidence of civil banking regulations is admissible for the limited purpose of showing the defendant's motive or intent. *See id. at* 866-67 (citing *United States v. Cordell,* 912 F.2d 769, 774-76 (5th Cir.1990)). At Harvard's trial, evidence of banking regulations tended to prove that Harvard had a motive to make false entries in order to hide the nature of the sham loan to Schapiro. Evidence that Harvard's non-disclosure of the "consulting fee" was in violation of civil banking regulations went toward showing Harvard's knowledge of his duty to disclose the fee and his motivation to hide his receipt of the fee.

The district court frequently instructed the jury regarding the regulatory evidence and guided its consideration of such evidence during the testimony of each government witness and at the end of the trial. For example, at the end of the trial, the district court instructed the jury, in relevant part:

> You are cautioned . . . that you may not find the Defendant guilty of any crime solely because he may have violated such an administrative banking regulation or because he may have violated internal bank policies. However, you may, but are not required to consider evidence of violations of administrative banking regulations as you would any other evidence in determining whether the Defendant had the required intent to commit the crime charged in the indictment.

R19:2000-01.

It is clear that the district court was mindful of the potentially prejudicial nature of the regulation evidence and the possibility that it might be confused with violations of federal criminal law. It is also clear from the record that the district court took appropriate measures to ensure that the jury did not improperly use the evidence in determining Harvard's guilt or innocence. We conclude that the district court employed the necessary measures to prevent prejudice and confusion and, in doing so, neither abused its discretion nor prejudiced Harvard's case by permitting evidence of banking regulations for limited purposes.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40818

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JACK C. HARVARD
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Texas, Sherman

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ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 1/7/97, 5 Cir., ___, ___ F.3d ___)

(Filed Mar. 27, 1997)

Before WISDOM, JONES, and WIENER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in

regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	NO. 4:94cr52
	§	
JACK C. HARVARD	§	

ORDER

(Filed Aug. 17, 1995)

On this day came on for consideration Defendant Jack C. Harvard's Motion For Judgment of Acquittal or for a New Trial and his supplement to his motion, and the court having considered the motion and the supplement thereto and the responses of the government, is of the opinion that the motion should be denied.

In defendant's original motion, he argues that he is entitled to a new trial because the jury's verdict is not supported by the evidence. When the issue of the sufficiency of the evidence is raised in a motion for new trial, the court must determine whether a reasonable trier of fact could have found that the evidence establishes guilt beyond a reasonable doubt. In applying this standard, the court must consider the evidence, direct and circumstantial, in a light most favorable to the government and accept all reasonable inferences which tend to support the jury's verdict. *United States v. Cardenas*, 748 F.2d 1015 (5th Cir. 1984); *United States v. Stephens*, 964 F.2d 424 (5th Cir. 1992); and *United States v. Bermea*, 30 F.3d 1539 (5th Cir. 1994). The court has carefully reviewed the evidence in

this case and has concluded that the evidence is sufficient to support the jury's verdict.

In footnote 5 to his motion, defendant contends a new trial is warranted because of rulings made by this court during the course of defendant's trial and the pre-trial proceedings. The court has already ruled on these issues and finds no basis for changing any of the court's rulings. The court is somewhat puzzled by Item No. 10 where the defendant asserts that the court erred in instructing the jury on both prongs of Section 1344 when the prosecution had elected the first prong. The charge of the court only instructed on Section 1344(a)(1), which was the section elected by the government.

In his supplement to his motion, defendant contends that he is entitled to a new trial because of the decision of the Supreme Court in *United States v. Gaudin*, No. 94-514, 1995 WL 360212 (Sup. Ct. June 19, 1995). The court has concluded that *Gaudin* is not controlling in this case. In *United States v. Gaudin* the defendant was prosecuted for violating Title 18, United States Code, Section 1001. Materiality is an essential element that the government must prove in order to establish a violation of 18 U.S.C. § 1001. In this case Defendant Harvard was charged with violating 18 U.S.C. 656 and 18 U.S.C. 1005. Materiality is not an essential element in order to establish a violation of either of these sections. This court's instructions to the jury concerning the required elements to prove a violation of these statutes were correct. Any reference by the court to material information and materiality in the court's instructions on 18 U.S.C 1005 did not lower the government's standard of proof or prejudice the defendant in any other way.

For the foregoing reasons, defendant's motion and supplement thereto should be denied.

IT IS SO ORDERED.

Signed this 17th day of August, 1995.

/s/ Paul Brown
UNITED STATES
DISTRICT JUDGE